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NOTE AND COMMENT.

IGNORANCE AND MISTAKE OF LAW CAUSED BY OVER-RULED CASES.—It is often said that everyone is conclusively presumed to know the law, and ignorance of it excuses no one. The fact is that it is in the nature of things impossible for anyone to know the law beyond the partial and uncertain expression of it in decided cases and in the equally vague, ambiguous, and perhaps void declarations of it in the statutes. No one knows or is supposed to know the law; the highest authority is only an opinion; and he who pretends to know is at once recognized, by all but the most ignorant, as an impostor. As to the other part of the maxim, that ignorance of the law excuses no one, this statement is as false as the first. As to this branch of the maxim, the community is divided into three classes, judges, lawyers, and laymen. Laymen are bound to know the law, and ignorance is no excuse; lawyers are bound to know a little law, the plainest and most generally understood principles, and these only; but the judges are not bound or supposed to know any law at all, and cannot be held liable in any way for the most amazing ignorance in their judicial application of it. And all this is as it should be; no other rule would be even endurable. The judge is bound to administer the law as he sees it, and is entitled to the assistance of counsel on both

sides in discovering its application to the case before him. To hold him accountable for correctly anticipating the last guess of the supreme court upon it would be intolerable. Again the man who makes the practice of the law his profession is bound, as other men are in their several callings, to possess a fair ordinary knowledge of it and to exercise ordinary skill in performing his work. No more is asked of other men, and why more of him? To demand less would permit the adventurer to impose the loss from his recklessness on those who reposed confidence in him. To demand more would not merely make the profession of law extra-hazardous, but without parallel; and those by nature and training best fitted for the work would be forced to abandon it, and leave the only recourse of the public, in need of advice and service, the sharper and impostor. On the other hand, to make the liability for duty violated to depend on the knowledge by the party that he owes the duty, would be to make the administration of law impossible; for since no one can know the whole law, the existence of the duty would be made to depend in no way on the merits of the other party's right but on the merely accidental fact of knowledge, which is easily denied, unusual in fact, and, even when possessed, almost impossible of proof. Such a rule would also make men unequal before the law, place a premium on ignorance, and put those at greatest disadvantage who most faithfully performed their duty to the state in attempting to know and obey its requirements. The rule is one of necessity and does not depend on any real or supposed knowledge of the law. It applies to both civil and criminal liability, to both common law and statute, to citizen and foreigner within our borders, and though actual knowledge of the particular law be impossible by reason of being so recently enacted that time to learn of it has not elapsed.

Yet ordinarily hardship seldom arises from the application of the doctrine, since the violation of law from which the liability springs is usually one which the defendant's conscience tells him is wrong, though he know nothing of the law, and when this is not the case the power to pardon, and the mercy of the court, are a sufficient protection in criminal cases, whatever may be said of cases of civil rights and liabilities. For example, we are not shocked by the application of the statute making it a capital offense for a sailor to attempt to kill any superior officer, to the case of a sailor who attempted to kill his captain on a voyage started before the law was enacted; wherefore it was impossible for the sailor to know the law. (*Rex* v. *Bailey,* Russell & R. 1.)

While the fact that the act was merely *malum prohibitum* and done in the utmost good faith, even on the advice of the best obtainable counsel, and after careful investigation of the statutes and decisions, is no defense, (*United States* v. *Anthony,* 11 Blatchf. 200, Fed. Cas. No. 14,459) as that serving drinks at a lunch counter is not keeping a public bar within the meaning of the statute as theretofore interpreted by the highest court of the state, (*Commonwealth* v. *Everson,* 140 Mass. 292, 2 N. E. 839); it has been thought by some courts to be going too far to hold a man criminally liable for an act merely *malum prohibitum,* if the act was done after the highest court of the state had declared the statute unconstitutional, and before the court had

discovered its error in not sustaining the statute. Such a case was *State* v. *O'Neil* (1910), — Iowa —, 126 N. W. 454. A statute made it unlawful to sell intoxicating liquors; the court had held the statute unconstitutional as to solicitation of orders for goods to be sent from a place outside of the state where the seller's main place of business was located, and later had held that the statute did not interfere with interstate commerce in such a manner as to be void in its application to such a transaction. Between these two decisions the defendant solicited orders and made sales of liquors as he supposed, in view of the first decision, he had a right to do; and the court held that a conviction for such act could not be sustained. All the judges seemed very desirous of arriving at that conclusion; but they could not agree at all as to the ground on which to put their decision. Mr. Justice McCLAIN would put the decision on the ground that there was no criminal intent; and without intent to do wrong, there was nothing to punish any more than in the case of an act done by an infant or insane person. But Mr. Chief Justice DEEMER objected that the intent to make the sale was the only intent the law required; and the reason offered would prevent conviction in any case of an act done under mistake of law; and he feared that the introduction of such a principle would be fraught with danger, and liable to be an embarrassing precedent. He would hold that the overruled decision was law till over-ruled; like the interpretation of a statute by the court, which is held to be a part of the statute for the purpose of construing contracts which must be supposed to have been made by the parties in view of the decision making such interpretation, so that the decision is one of the terms of the contract. This would make all acts lawful which were done after the statute is declared unconstitutional, and would generally avoid any opportunity to reconsider the question of the validity of the law. He was also of opinion that the same conclusion could be reached by holding that punishment for such an act would be cruel and unusual. Mr. Justice WEAVER objected to these views, maintaining that it was inconceivable that a mere fine of $50, or imprisonment for 30 days is cruel or unusual punishment for a crime committed under mistake of law more than if done with knowledge of the law. He held that the one tenable ground for the decision was that there is implied in every statute the intent that it shall have a just and reasonable construction, and not one which shall lead to absurdity or manifest injustice; and it has often been held that an act clearly within the letter of a penal statute is not within its spirit; and he would say that no legislature could have intended that the statute should have application to a case occurring between the time when the statute was held unconstitutional and the time the error in that decision was discovered and the decision over-ruled. "It is a fair deduction from these authorities that the very absurdity, to say nothing of the essential injustice, involved in punishing as criminal the violation of a statute of the state which we as the court of last resort in that state were then assuring the people was unconstitutional and void, and not entitled to their obedience, is sufficient reason for saying that the legislature could not have intended any such application of its enactment. * * * On the other hand, I cannot agree with the concurring opinion by the chief justice in hold-

ing that a change in judicial interpretation of a statute becomes a part of the statute. * * * Our courts have always been quick to deny the charge of magnifying their authority or indulging in judicial legislation."

J. R. R.

THE DOCTRINE OF EXEMPLARY DAMAGES IN ITS APPLICATION TO CORPORATIONS.—During the past year, three cases have been decided by the Supreme Courts of California, Oklahoma and Wisconsin, involving the liability of a corporation to respond in exemplary or punitive damages for the malicious acts of its officers and servants. *Lowe* v. *Yolo Consolidated Water Co.* (1910), — Cal. —, 108 Pac. 297; *Chicago, R. I. & Pac. Ry. Co.* v. *Newburn* (1910), — Okla. —, 110 Pac. 1065; *Topolewski* v. *Plankinton Packing Co.* (1910), — Wis. —, 126 N. W. 554. The Oklahoma and Wisconsin courts, applying the rule heretofore prevailing in those states, held that a corporation cannot be charged with exemplary damages for the wanton and malicious acts of its servants, in the absence of evidence showing that the corporation participated in or authorized the commission of the tortious act or subsequently ratified it. In the California case, the act complained of was committed by the president and general manager of the corporation, and the Supreme Court of California held that a corporation may, because of the acts of those whom it has placed in charge of its affairs, be held guilty of oppression and malice, making it liable for exemplary damages.

Whether the doctrine of *respondeat superior* should be extended in the case of a corporation so as to render the corporation liable for more than compensatory damages for the malicious act of its agents and servants, has been the subject of vigorous controversy in this country and England. In the early part of the last century, the rule was universally announced by the courts, that, malice being the foundation of the doctrine of exemplary damages, such damages could not be charged against a corporation in any case. It was then argued that a corporation, being a mere legal entity, without a soul or animate body or moral sense, was incapable of entertaining a malicious intent, and consequently that an action for a wrong, in the constitution of which malice is an essential element, could not be maintained against a corporation. This doctrine, however, is no longer of more than historical importance, having been repudiated by English and early American decisions. *Whitefield* v. *S. E. Ry. Co.*, 96 E. C. L. 115; *Green* v. *London General Omnibus Co.*, 29 L. J. C. P. 13, 1 L. T. (N. S.) 95; *Goodspeed* v. *E. Haddam Bank*, 22 Conn. 529; *Railroad Co.* v. *Quigley*, 21 How. 204.

But although the courts of this country now universally recognize that there is nothing inherent in the nature of a corporation which should preclude the imposition of exemplary damages on the corporation for the malicious acts of its agents and servants, yet as to the *circumstances* under which a corporation may render itself so liable, the courts are at variance.

That a corporation is not liable to be punished by exemplary damages for the malicious torts of its agents or servants, unless the corporation itself has expressly or by implication of law authorized the tortious act or ratified it subsequent to its commission is the holding of the courts of California,